No. 03-334

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SHAFIQ RASUL, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantánamo Bay Naval Base, Cuba?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The following persons imprisoned at Guantánamo Bay Naval Base appeared below as petitioners: Mamdouh Habib; Shafiq Rasul, Asif Iqbal; and David Hicks. The following individuals, who are family members of the detainees listed above, also appeared below as next friend petitioners: Maha Habib, the wife of Mamdouh Habib; Skina Bibi, the mother of Shafiq Rasul; Mohammed Iqbal, the father of Asif Iqbal; and Terry Hicks, the father of David Hicks.

The following persons appeared below as respondents: George W. Bush, President of the United States; Donald H. Rumsfeld, Secretary of Defense; Brigadier General Michael Lehnert, Commander of Joint Task Force-160; Brigadier General Rick Baccus, Commander of Joint Task Force-160; Colonel Terry Carrico, Commander of Camp X-Ray, Guantánamo Bay, Cuba; and Lieutenant Colonel William Cline, Commander of Camp Delta, Guantánamo Bay, Cuba.

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OPINION BELOW

The opinion of the D. C. Circuit is reported at 321 F.3d 1134 (D.C. Cir. 2003). P.A. 1a.[1] The orders denying petitions for reconsideration by the panel and rehearing *en banc* are unreported, but are reprinted at P.A. 31a. The opinion of the district court is reported at 215 F. Supp. 2d 55 (D.D.C. 2002). P.A. 32a.

JURISDICTION

The D.C. Circuit denied timely petitions for reconsideration and rehearing *en banc* on June 2, 2003. Petitioners filed a timely Petition for Writ of Certiorari on September 2, 2003, and this Court granted certiorari on November 10, 2003. *Rasul v. Bush*, 124 S.Ct. 534 (2003). J.A.64-68. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. §2241, which provides in relevant part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . .
> * * * *
> (c) The writ of habeas corpus shall not extend to a prisoner unless –

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[1] References to the Appendix to the Petition for Writ of Certiorari are denoted P.A.__; references to the Joint Appendix are denoted J.A.__.

> 1. He is in custody under or by color of the authority of the United States ...; or
>
> * * * *
>
> 3. He is in custody in violation of the Constitution or laws or treaties of the United States....

This case also involves the Due Process Clause of the Fifth Amendment, U.S. Const. amend. V (P.A. 67a); the Suspension Clause, U.S. Const. art. I, §9, cl. 2 (J.A. 128); Geneva Convention III Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (P.A.69a-70a); Geneva Convention IV Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, 6 U.T.S. 3516, 75 U.N.T.S. 287 (P.A.69a-70a); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR. Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) (P.A. 69a); and *Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees*, U.S. Army Regulation 190-8 (applicable to the Departments of the Army, the Navy, the Air Force, and the Marine Corps) (October 1, 1997) (P.A. 71a).

STATEMENT OF THE CASE

Seized in ostensible connection with hostilities abroad, the petitioners are in United States custody at Guantánamo Bay Naval Station, Cuba. They have been confined for two years without charges, access to counsel or courts, or recourse to any legal process. The Executive has presented no evidence to justify the detentions, and claims it is under no obligation to do so. It claims it may hold the petitioners under these conditions indefinitely.

Shafiq Rasul and Asif Iqbal are British citizens; Mamdouh Habib and David Hicks are Australian citizens.[2] J.A.75-108. After September 11, 2001, Petitioner Rasul traveled from his home in Britain to visit relatives in Pakistan, explore his culture, and continue his computer studies. He was seized in Pakistan after leaving a visit with his aunt. J.A.83. Petitioner Iqbal also traveled to Pakistan from his home in Britain after September 11, intending to marry a woman from his father's small village. Shortly before the marriage, his father allowed him to leave the village briefly; while away, he too was seized in Pakistan. *Id.* Both men were ultimately detained by Northern Alliance or other forces and turned over to the United States in December 2001. In January 2002, they were transported to Guantánamo, where they have been held ever since. J.A.86.

Petitioner Habib traveled to Pakistan from his home in Australia in August 2001, to look for work and a school for his teenage children. On October 5, 2001, he was arrested by Pakistani authorities, who turned him over to Egyptian authorities. Early in 2002, Egypt transferred Mr. Habib to U.S. custody, and on May 4, 2002, he was transported to Guantánamo. J.A.112, 119. Petitioner Hicks was living in Afghanistan at the time of his seizure by the Northern Alliance, which transferred him to United States custody in December 2001. J.A.84. Hicks' father believes his son may have joined the army of the then-incumbent Government of Afghanistan, the Taliban. P.A.40. Like Petitioners Rasul and Iqbal, he has been held at Guantánamo since January 2002. J.A.86.

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[2] The allegations recounted above were accepted as true by the lower courts, for purposes of respondents' motion to dismiss for lack of jurisdiction.

The four Petitioners have never been enemy aliens or unlawful combatants. Prior to their detention, the Taliban had caused no American casualties, and the Petitioners neither caused nor attempted to cause harm to American personnel. The four Petitioners had no involvement, direct or indirect, in any terrorist act, including the attacks of September 11, 2001. They maintain today, as they have throughout this litigation, that they are innocent of wrongdoing, and the United States has never presented evidence to the contrary. J.A.86, 112, 113.

All four Petitioners promptly identified themselves to the United States by correct name and nationality. Government agents at the prison have repeatedly interrogated all four Petitioners but no Petitioner has been charged with any wrongdoing or brought before any a military or civilian tribunal. J.A.86, 113. With the recent exception of David Hicks,[3] no Petitioner has been informed of his rights under domestic or international law, and the Executive claims the petitioners should not be so informed. They do not even

[3] In the lower courts, the Executive took the position the prisoners were held pursuant to the President's power as Commander in Chief "and under the laws and usages of war." *E.g. Rasul v. Bush*, Government's Motion to Dismiss at 4. On July 3, 2003, the President designated David Hicks and five other detainees as being held pursuant to the President's Military Order of November 13, 2001, concerning the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." 66 Fed. Reg. 57,831. Mike Allen & Glenn Frankel, *Bush Halts Military Proceedings Against 3*, WASH. POST, Jul. 19, 2003, at A15. According to the Government, this means Hicks *may*, but need not, be brought before a military commission. On December 3, 2003, the Executive assigned military counsel for Petitioner Hicks, and counsel has since visited with Hicks. John Mintz, *Guantanamo Bay Detainee Is First to Be Given a Lawyer*, WASH. POST, Dec. 4, 2003, at A8. At present, however, Hicks has not been charged, has no recourse to any procedure for demonstrating his innocence or seeking his release, and remains subject to indefinite detention without legal process.

know they are the subject of this litigation. The Executive also claims the petitioners are not entitled to the protections of the Geneva Convention. J.A.92, 119. Only Petitioner Hicks has received counsel. No charges are pending against him, and he, like the other petitioners, has no means by which he can establish his innocence or secure his release. Military officials have acknowledged that at least some detainees at Guantánamo are victims of circumstance and probably innocent. J.A.121. *See* Katharine Q. Seelye, *A Nation Challenged: Captives: An Uneasy Routine at Cuba Prison Camp*, N.Y. TIMES, Mar. 16, 2002, at A8 (quoting Deputy Commander at Guantánamo).

The Executive has disclosed little information regarding the detainees. It has not indicated what they are believed to have done to justify their seizure or their continued detention. It does not report on their current welfare. It has, however, "allowed tightly controlled media visits." Charles Savage, *Inside Guantanamo*, MIAMI HERALD, Aug. 24, 2003, at L1. According to published reports, the Guantánamo installation consists of four units, with construction underway on a fifth.[4] The majority of the inmates are held in three camps described by the Government as maximum-security facilities. These inmates are in solitary confinement, restricted to their 6' 8" x 8' cells twenty-four hours per day, except for thirty minutes of exercise three times per week, followed by a five-minute shower. *Id.* The inmates are shackled while outside their cells. They exercise on a "caged 25-foot by 30-foot concrete slab." *Id.* "Lights are kept on 24 hours a day, and guards pace the rows

[4] According to the prison commander, the new construction signals the Government's intention to rely on the prison "as long as the global war on terrorism is ongoing." Charles Savage, *Growth at Base Shows Firm Stand on Military Detention*, MIAMI HERALD, Aug. 24, 2003, at A1. Current plans call for a capacity of 1,100 inmates. *Id.*

constantly. Inside each cell, detainees have a hole-in-the-ground toilet, a sink with running water low enough to make washing feet for prayers easy, and an elevated shelf-bunk with a mattress."[5] *Id.*

The prison currently holds approximately 660 inmates from 44 countries. Nancy Gibbs, *Inside "The Wire,"* Time Mag., Dec. 8, 2003, at 40, 40. Though some inmates have been released in the past two years, others have replaced them and the prison has maintained approximately the same number of inmates for the past year. *Id.* However, days after this Court's grant of certiorari in the present cases, the Executive announced its intention to release approximately 140 inmates, more than double the number that had been released since the prison opened. *Id.* at 41. As of this writing, these releases have not taken place.

The Government has occupied Guantánamo since 1903, pursuant to a lease that grants the United States "complete jurisdiction and control," while Cuba retains "ultimate sovereignty." Agreement between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418. These terms are not defined in the lease. The lease term is indefinite. *Id.* Guantánamo is a self-sufficient American enclave, larger than Manhattan, with thousands of military and civilian residents. The base operates its own schools, power system, water supply, and internal transportation system. Congress has repeatedly extended federal statutes to the base and United States courts have long taken jurisdiction

[5] There have been thirty-four attempted suicides since the prison opened. *Guantanamo Inmate Tries to Kill Himself*, St. Louis Post-Dispatch, Jan. 7, 2004, at A8. Prison officials attribute the attempts "to the effects of the indefinite detentions on prisoner morale." *Guantanamo Detainee Attempts Suicide, Raising Number to 30* (Associated Press Aug. 15, 2003).

over disputes there. Gerald L. Neuman, *Surveying Law and Borders: Anomalous Zones*, 48 STAN. L. REV. 1197, 1228 (1996). Further facts about Guantánamo are set forth *infra*.

SUMMARY OF THE ARGUMENT

The district court had jurisdiction over the petitions for habeas corpus pursuant to 28 U.S.C. §2241, which codifies the Great Writ. The statute grants the federal courts power to review Executive detentions "in violation of the Constitution or laws or treaties of the United States." The prisoners in this case have been confined by the Executive for two years without legal process, in alleged violation of the Constitution, laws, and treaties of the United States.

The Executive contends that the federal judiciary is powerless to review the prisoners' detention because they are foreign nationals imprisoned beyond the "ultimate sovereignty" of the United States. This claim should be rejected. First, nothing in the statute purports to limit jurisdiction based on nationality or territory, and Congress has done nothing to suggest that federal courts should be stripped of their jurisdiction in these circumstances. The Court has long taken jurisdiction over habeas petitions filed by persons detained beyond this country's "ultimate sovereignty."

Second, the construction of the statute urged by the Executive, if accepted, would raise serious due process questions by permitting "an indefinite, perhaps permanent, deprivation of human liberty without any [judicial] protection." *Zadvydas v. Davis*, 533 U.S. 678, 692 (2001). It would also raise serious questions under the Suspension Clause by denying an entire class of persons access to the writ through Executive fiat. Under settled doctrines forbidding a

reading of statutes that raises grave constitutional doubts or extinguishes habeas jurisdiction without the clearly expressed intention of Congress to do so, the Court should avoid such a construction of §2241. The Executive's proposed construction would also violate the principle that statutes must, when possible, be construed in conformity with international law, which prohibits prolonged detention without judicial recourse.

Johnson v. Eisentrager, 339 U.S. 763 (1950), is no bar to this proceeding. There, the Court considered whether enemy aliens convicted of war crimes by a lawful military commission during a declared war were entitled to post-conviction review in federal habeas. The prisoners were convicted, sentenced, and imprisoned in post-war China and Germany, which the military temporarily controlled as a result of wartime operations. At trial, the prisoners enjoyed a number of due process rights, and raised the same constitutional issues they would later urge before the Court. The Court held that these prisoners had "no right to the writ of habeas corpus." *Id.* at 781.

The habeas statute gave the Court the power to consider the prisoners' contentions in *Johnson*, and the Court exercised that power by examining their claims at length. First, the Court gave the prisoners "the same preliminary hearing" it had previously given to other war criminals imprisoned here and abroad. *Id.* at 780-81. Second, the Court scrutinized the prisoners' application to determine whether the military commissions had jurisdiction over the alleged crimes. *Id.* at 790. And third, the Court analyzed and rejected the merits of the prisoners' claims under both the Constitution and the Geneva Conventions. *Id.* at 785-90.

Johnson, therefore, is best understood as a restraint on the *exercise* of habeas, rather than a limitation on the *power* of the federal courts. The Court has often limited the exercise of habeas to avoid undue interference with a lawful coordinate system of justice that provided petitioners with a full and fair opportunity to litigate their claims. In *Johnson*, the Court limited habeas to a determination that the prisoners were convicted enemy aliens detained outside our territory lawfully tried by a properly constituted military commission.

By contrast, the prisoners here have been detained for two years without charges, trial, access to counsel or the courts or process of any kind. They are not citizens of enemy nations, but citizens of our closest allies who maintain that they are innocent of any wrongdoing. They are held at Guantánamo, far from the theatre of military operations and subject to the complete and exclusive jurisdiction and control of the United States Government. Far from seeking post-conviction relief after a trial, they complain that they have had no trial or other lawful process. The very factors that called for restraint in *Johnson* now call for review, and the district court has jurisdiction.

ARGUMENT

I. THE HABEAS STATUTE GIVES THE DISTRICT COURT JURISDICTION

The Great Writ stands as "the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired." *Bowen v. Johnston*, 306 U.S. 19, 26 (1939). Since the founding, it has been the indispensable means for the judiciary to test the legality of executive detention. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 99 (1807); *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874); *Johnson v. Zerbst*, 304 U.S. 458, 465-67 (1938); *Zadvydas v. Davis*, 533 U.S. 678,

699 (2001); *I.N.S. v. St. Cyr*, 533 U.S. 289, 301-304 (2001).

Yet the Executive argues that the federal courts are powerless to review these prisoners' indefinite detentions because they are foreign nationals brought by the military to a prison beyond the "ultimate sovereignty" of the United States. The Government is mistaken. First, nothing in the habeas statute supports such a limitation, nor has Congress manifested an intention to strip the federal courts of their jurisdiction under these circumstances. The Court has routinely taken jurisdiction of habeas petitions filed by persons in custody under the authority of the United States in places beyond its "ultimate sovereignty," even during times of armed conflict. And the Court has never suggested that the Executive can incarcerate people indefinitely, beyond the reach of judicial recourse, simply by confining them in a facility that the United States Government controls through some arrangement other than "ultimate sovereignty."[6]

Second, the Executive's argument – if accepted – would raise "serious constitutional problem[s]." *Zadvydas*, 533 U.S. at 692. It would permit "an indefinite, perhaps permanent, deprivation of human liberty without any [judicial] protection," *id.*, and would suspend the writ for an entire class of detainees on no firmer basis than Executive fiat. The Executive would have the Court "close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent." *United States v. Castro*, 124 S. Ct. 786, 791 (2003). This country has rejected imprisonment without legal process, even during times of war, and the Court should not interpret the habeas statute in a manner that permits the creation of an offshore prison for

[6] The Executive leans heavily on *Johnson v. Eisentrager*, 339 U.S. 763 (1950). But *Johnson* cannot bear the weight, as we demonstrate at pages 30-46 *infra*.

foreign nationals that operates entirely outside the law.[7] *Id.*; *St. Cyr*, 533 U.S. at 314.

Third, construing the statute to exclude habeas jurisdiction would violate the well-established canon that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). In recent decades 151 nations, including this one, have ratified the International Covenant on Civil and Political Rights, which guarantees judicial review of executive detentions, even in wartime. And 191 nations, including the United States, have joined the 1949 Geneva Conventions, which require that prisoners captured in combat zones have the right to be brought before a "competent tribunal" whenever there is "any doubt" as to their status. The Executive's strained construction of the habeas statute, permitting indefinite incarceration with no legal process, would violate these fundamental precepts of international law. The statute should not be so construed.

A. Habeas Turns On Executive Detention, Not The Accident of Nationality or Situs

Title 28 U.S.C. §2241 (c)(1) and (c)(3) confer jurisdiction on the district court to hear applications for habeas corpus filed by any person imprisoned "under or by color of the authority of the United States," or "in violation of the Constitution or laws or treaties of the United States."

[7] Even the prospect of judicial review is salutary. Only after this Court granted *certiorari* did the Executive announce its apparent intention to release 140 detainees. *Cf. Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 42-43 (1944) ("Respondent has consistently urged the validity of [its] plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made.").

Nothing in the text purports to exclude habeas jurisdiction on the basis of nationality or territory. On the contrary, "[t]his legislation is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction."[8] *Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 325-26 (1868).

The history of the statute is well known. In 1789, Congress granted habeas jurisdiction over prisoners "in custody, under or by colour of the authority of the United States." Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81-82. In 1842, Congress made explicit that federal habeas included foreign nationals. Act of Aug. 29, 1842, ch. 257, 5 Stat. 539, 539. In 1867, Congress expanded habeas review to include "all cases where any person may be restrained of his or her liberty in violation of the constitution or of any treaty or law of the United States." Act of Feb. 5, 1867, ch. 28, 14 Stat.

[8] Section 2241(a) empowers federal judges to grant the writ "within their respective jurisdictions." 28 U.S.C. §2241(a). At one time, the Court interpreted this language to require the petitioner's presence within the jurisdiction. *See Ahrens v. Clark*, 335 U.S. 188, 189-93 (1948). This is no longer the law, however, *see Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 494-95 (1973), and petitions challenging military detention overseas are properly filed in the District of Columbia because the courts have jurisdiction over the custodian. *E.g., McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281, 282-83 (1960) (habeas filed in the District Court for the District of Columbia against Secretary of Defense by petitioner detained in Morocco at time of filing); *Toth v. Quarles*, 350 U.S. 11, 13 n.3 (1955) (habeas filed in the District Court of the District of Columbia against Secretary of the Air Force by sister of petitioner detained in Korea); *Ex Parte Hayes*, 414 U.S. 1327, 1328-29 (1973) (Douglas, J., in chambers) (habeas filed in District Court of the District of Columbia against Secretary of the Army by petitioner detained in Germany).

385, 385. The 1867 Act is the "direct ancestor" of 28 U.S.C. § 2241(c).[9] *Felker v. Turpin*, 518 U.S. 651, 659 (1996).

Though habeas today often involves collateral review of criminal convictions (as in *Johnson v. Eisentrager*), "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *St. Cyr*, 533 U.S. at 301; *Swain v. Pressley*, 430 U.S. 372, 380 n. 13 (1977); *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in result) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial"). Indeed, at common law, "[w]hile habeas review of a court judgment was limited to the issue of the sentencing court's jurisdictional competency, an attack on an executive order could raise all issues relating to the legality of the detention." *St. Cyr*, 533 U.S. at 301 n. 14 (internal citations omitted).[10]

The Court has always jealously guarded its power to review Executive detention. It has consistently required a clear and unequivocal statement of legislative intent before concluding that Congress stripped the federal courts of their habeas jurisdiction. *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 102 (1869); *DeMore v. Kim.*, 538 U.S. 510, 123 S.Ct. 1708, 1714 (2003); *see also St. Cyr*, 533 U.S. at 308-09. In *Kim*, the Court held that Congress had not removed habeas jurisdiction despite statutory language which provided that

[9] The historical foundations of the writ are canvassed in greater detail by several *amici*. *See* Brief of the Commonwealth Lawyers Association as *Amicus Curiae*; Brief of Legal Historians as *Amici Curiae*.

[10] In addition to the habeas statute, Petitioners relied on 28 U.S.C. §1331 and 5 U.S.C. §702 in the lower courts to establish jurisdiction. J.A.76, 107. Jurisdiction under these provisions is discussed by the Petitioners in *Al Odah v. United States*, No. 03-343, and we adopt their arguments.

"[n]o court may set aside any action or decision by the Attorney General" to detain criminal aliens while removal proceedings are ongoing. *Kim*, 123 S.Ct. at 1714. And in *St. Cyr*, the Court preserved habeas jurisdiction in the face of four statutory provisions that could have been read as excluding it, including one entitled "Elimination of Custody Review by Habeas Corpus." 533 U.S. at 308-311, 314.[11]

Unlike *Kim* and *St. Cyr*, where the Court was faced with explicit – although insufficiently categorical – statutory provisions appearing to restrict the courts' habeas jurisdiction, the present case involves no remotely perceptible attempt by Congress to abridge jurisdiction.[12] And certainly, the Executive cannot amend the statute by fiat. *Cf. Youngstown*

[11] Other statutory language considered in *St. Cyr* provided that "judicial review" was available "only" by means other than habeas, and that "no court shall have jurisdiction to review" any final agency order. 533 U.S. at 308-311. Yet the Court found a "lack of clear, unambiguous, and express statement of congressional intent to preclude judicial consideration on habeas of such an important question of law." *Id.* at 314; *see also, e.g., Ex parte Yerger*, 75 U.S. at 102 ("We are not at liberty to except from [habeas corpus jurisdiction] any cases not plainly excepted by law...."); *Felker*, 518 U.S. at 660-61 (statutory provisions purporting to strip federal courts of jurisdiction did not foreclose habeas review).

[12] On the contrary, available evidence suggests that Congress *refused* to suspend the writ as part of the "war on terrorism." Published accounts indicate the earliest drafts of the USA PATRIOT Act, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, 107 Pub. L. No. 56, 115 Stat. 272 (2001), included a provision entitled 'Suspension of the Writ of Habeas Corpus.' Representative James Sensenbrenner, Chairman of the House Judiciary Committee, later told reporters "[t]hat stuck out like a sore thumb. It was the first thing I crossed out." Roland Watson, *Bush Law Chief Tried to Drop Habeas Corpus*, THE TIMES (London), Dec. 3, 2001, at 14; *see also* Steven Brill, *After: How America Confronted the Sept. 12 Era*, NEWSWEEK, Mar. 10, 2003, at 66 (same). The USA PATRIOT Act passed by Congress does not alter §2241. *See* USA PATRIOT Act §412(b)(1) (codified at 8 U.S.C. 1226a(b)(1)).

Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb...."); *Brown v. Allen*, 344 U.S. at 533 (Jackson, J., concurring) ("[I]f Congress intended a reversal of this traditional concept of habeas corpus it would have said so.").

Over time, Executive detention has taken countless forms, limited only by the perceived demands of the day. But the genius of habeas is "its capacity to reach all manner of illegal detention – its ability to cut through barriers of form and procedural mazes." *Harris v. Nelson*, 394 U.S. 286, 291 (1969).[13] To that end, the Court has long recognized that federal courts have the power to review every species of Executive imprisonment, wherever it occurs and whatever form it takes. The Court has entertained habeas petitions by aliens detained on ships at sea, *e.g., Chew Heong v. United States.*, 112 U.S. 536 (1884);[14] by United States citizens detained at American military installations overseas, *e.g., McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960);[15] and even by enemy aliens convicted of war crimes during a declared war, whether in the United States, *Ex parte*

[13] As discussed in Part II, the Court on occasion limits the *extent* of habeas review, but distinguishes these limitations from a restriction on its *power* to review executive detention. *See, e.g., Burns v. Wilson*, 346 U.S. 137, 139 (1953) (plurality) (question is "not whether the District Court has any power at all to consider petitioners' applications; rather our concern is with the manner in which the Court should proceed to exercise its power").

[14] *See also, e.g., Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) ("An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of congress, and thereby restrained of his liberty, *is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful.*" (emphasis added)).

[15] *See supra* note 8 (collecting additional cases).

Quirin, 317 U.S. 1 (1942), or in territories overseas, *In re Yamashita*, 327 U.S. 1 (1948). Even the Executive has conceded that the federal courts would have habeas jurisdiction over an American citizen imprisoned at Guantánamo.[16]

Yet the Executive insists the prior decisions count for naught because no single case embraces all the circumstances presented here. This, of course, testifies to the unprecedented character of the Executive's position. Detention without legal process is the very antithesis of this country's wartime experience, as shown below.[17] It is not surprising, therefore, that the Court has had no occasion to consider whether the Executive may unilaterally strip the federal courts of their statutory power to review the indefinite detention of foreign nationals without legal process, simply by deciding to detain them in an offshore prison.

B. The Habeas Statute Should Not Be Read To Condone Creating A Prison Outside The Law

The lower court did not discuss the scope of the habeas statute. Instead, it resolved the jurisdictional question by concluding the prisoners have no rights that may be vindicated in federal court, "under the due process clause or otherwise." P.A.12a. In its view, foreign nationals may be subjected to an "indefinite, perhaps permanent, deprivation of human liberty without any [judicial] protection," *Zadvydas*, 533 U.S. at 692, so long as the Executive elects to detain

[16] Tr. of Nov. 17, 2003 Oral Argument at 16:25-19:8, *Padilla v. Rumsfeld*, 2003 U.S. App. LEXIS 25616 (Nos. 03-2235, 03-2438), *at* http://news.findlaw.com/hdocs/docs/padilla/padrums111703trans.pdf.

[17] *See also* Brief of Former American Prisoners of War as *Amicus Curiae*; Brief of the National Institute of Military Justice as *Amicus Curiae*.

them outside the "ultimate sovereignty" of the United States. This holding creates a "serious constitutional problem," *id.*, both by approving prolonged detention without legal process, and by suspending the writ in the absence of any indication of congressional intent. To avoid these results, the Court should interpret the habeas statute to allow the prisoners to bring this challenge in federal court. *See St. Cyr*, 533 U.S. at 314.

1. The Executive's Interpretation Of The Habeas Statute Would Raise Serious Doubts Under The Due Process Clause

At its core, the Due Process Clause protects against unlawful bodily restraint. *See, e.g., Zadvydas*, 533 U.S. at 690 ("Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that Clause protects."). The Executive may not imprison people for more than brief periods unless it acts pursuant to narrowly circumscribed criteria and strict procedural restraints. *Id.* at 690 - 91 ("[W]e have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections."); *cf. Kim*, 123 S.Ct. at 1720 (contrasting the "indefinite" and "potentially permanent" detention condemned in *Zadvydas* with the "brief" detention upheld in *Kim*).[18]

[18] *See also United States v. Salerno*, 481 U.S. 739, 747, 750-52 (1987) (stressing stringent time limitations and presence of judicial safeguards); *Addington v. Texas*, 441 U.S. 418, 425-27 (1979); *Kansas v. Hendricks*, 521 U.S. 346, 356-58 (1977) (emphasizing strict procedural protections); *Gerstein v. Pugh*, 420 U.S. 103, 117-18 (1975); *Jackson v. Indiana*, 406 U.S. 715, 737-39 (1972).

Statutory schemes that subject a particular class of aliens to potential restraint have consistently been interpreted so as to respect these principles. Aliens detained pursuant to these schemes enjoy at least the right to a fair hearing to determine whether they fall within the defined class. *See, e.g., Ludecke v. Watkins,* 335 U.S. 160, 171 n. 17 (1948) (administrative hearing followed by judicial review to determine whether person detained was in fact an "enemy alien"); *Carlson v. Landon*, 342 U.S. 524, 540-41 (1952) (administrative hearing followed by judicial review to determine whether detained alien was an active member of the communist party); *Kim*, 123 S. Ct. at 1722 (Kennedy, J., concurring) (detainee entitled to hearing "to demonstrate that he was not improperly included in a mandatory detention category."); *Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting on other grounds) ("[I]nadmissible aliens are entitled to be free from detention that is arbitrary or capricious.").

During the Second World War, the Court repeatedly agreed that even convicted saboteurs and war criminals, seized here and abroad, were entitled at least to a hearing to determine their status. *See Quirin*, 317 U.S. at 24-25; *Yamashita*, 327 U.S. at 8; *Johnson*, 339 U.S. at 780-81 (prisoners received "the same preliminary hearing as to sufficiency of application that was extended in *Quirin* .... [and] *Yamashita*"). In this respect, the Executive "is certainly not immune from the historic requirements of fairness merely because he acts, however conscientiously, in the name of security." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 173 (1951) (Frankfurter, J., concurring).

Yet the Executive takes the position now that foreign nationals imprisoned by the military beyond the "ultimate sovereignty" of the United States have no rights that can be

protected by a federal court and may be detained indefinitely without legal process. This has never been the law:

> The proposition is, of course, not that the Constitution "does not apply" overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place.
> ***
> [T]he question of which specific safeguards of the Constitution are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is "due" a defendant in the particular circumstances of a particular case.

Reid v. Covert, 354 U.S. 1, 74-75 (1957) (Harlan, J., concurring).[19] The Court later quoted this language with approval in a case involving a non-resident alien. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270 (1990); *see also id.* at 277-78 (Kennedy, J., concurring).[20]

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[19] *See also Reid*, 354 U.S. at 56 (Frankfurter, J., concurring) ("Governmental action abroad is performed under both the authority and the restrictions of the Constitution - for example, proceedings before American military tribunals, whether in Great Britain or in the United States, are subject to the applicable restrictions of the Constitution.").

[20] In *Verdugo*, the Court held that the warrant clause of the Fourth Amendment does not apply to the search of a foreign national in Mexico by Mexican agents. *Dicta* cited *Johnson v. Eisentrager* for the "emphatic" rejection of the "extraterritorial application of the Fifth Amendment." *Verdugo*, 494 U.S. at 269. But this language cannot be read in isolation. *Verdugo* cited the *Insular Cases, id.* at 268-69, in which the Court repeatedly recognized that the Due Process Clause embodies a fundamental right that constrains the Executive, even when it acts with respect to an alien outside the United States. As the Court stated in *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922):

The suggestion, therefore, that the Constitution tolerates the creation of a prison beyond the reach of the judiciary, reserved for foreign nationals who may be held on mere Executive fiat, is mistaken. Rather, the courts must undertake a more discriminating analysis of the interests at stake. Here, that analysis can wait for another day. For while "there is no table of weights and measures for ascertaining what constitutes due process," *Burns v. Wilson*, 346 U.S. 137, 149 (1953) (opinion of Frankfurter, J.), the Executive's claim that courts lack jurisdiction even to undertake the weighing misreads the habeas statute and would raise serious questions under the Due Process Clause.

> [T]he real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power.... *The guaranties of certain fundamental personal rights declared in the Constitution, as for instance that no person could be deprived of life, liberty or property without due process of law*, had from the beginning full application in the Philippines and Porto Rico....

Id. at 312-13 (emphasis added).

Verdugo then approvingly quoted Justice Harlan's *Reid* concurrence insisting that the extra-territorial reach of the Constitution depended on what process was due in a particular case. Although *Reid* had involved a U.S. citizen overseas, *Verdugo* did not hesitate to endorse Justice Harlan's guiding principle in a case involving a foreign national, just as it had in the *Insular Cases*. *E.g.*, *Downes v. Bidwell*, 182 U.S. 244, 283 (1901) (rejecting theory that aliens in unincorporated territories "have no rights which [Congress] is bound to respect."). It is thus incorrect to read *Verdugo* as establishing a categorical rule that the Due Process Clause cannot apply to aliens overseas. Indeed, Justice Kennedy's concurring opinion in *Verdugo* made explicit that the Court had not yet resolved the Constitution's extra-territorial reach "when the Government acts, in reference to an alien, within its sphere of foreign operations." 494 U.S. at 277.

2. The Executive's Interpretation Of The Habeas Statute Would Also Raise Serious Doubts Under The Suspension Clause

The Court should also avoid an interpretation of the habeas statute that suspends the writ for an entire class of claimants based solely on Executive proclamation. In *St. Cyr*, the Government argued that certain provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, should be construed as denying the alien petitioners the right to habeas review of their deportation proceedings. *St. Cyr*, 533 U.S. at 308-11. The Court rejected this position, noting that such a construction would raise grave constitutional doubts under the Suspension Clause. *Id.* at 305.

It was common ground among the parties in *St. Cyr* that Executive detention struck at the "historical core" of the writ, "and it is in that context that its protections have been strongest." *Id.* at 301. Furthermore, as the Court observed, "[i]n England prior to 1789, in the Colonies, and in this Nation during the formative years of our Government, *the writ of habeas corpus was available to nonenemy aliens as well as to citizens*." *Id.* at 301-02 (emphasis added) (footnote omitted).

While the Government acknowledged this historical understanding, it argued there was no unlawful suspension as long as "'an official had statutory authorization to detain the individual.'" *Id.* at 303 (quoting Brief for Respondent in *Calcano-Martinez v. INS*, at 33, O.T. 2000 (No. 00-1011)). It acknowledged "that the writ protected an individual who was held without legal authority, *id.*, but because the deportation statutes at issue in *St. Cyr* gave the Government authority to detain, the Government argued that the alien could complain of nothing more than a failure by the official detaining him to exercise his "discretionary power to determine whether the

person should be released," – a failing which, in the Government's view, raised no concern protected by the Suspension Clause. *Id.*

The Court rejected this argument. While acknowledging that the Government's "historical arguments are not insubstantial," the Court found that "the ambiguities in the scope of the exercise of the writ at common law identified by St. Cyr, and the suggestions in this Court's prior decisions as to the extent to which habeas review could be limited consistent with the Constitution," convinced the Court "that the Suspension Clause questions that would be presented by the INS' reading of the immigration statutes before us are difficult and significant." *Id.* at 304.

The constitutional questions are even more "difficult and significant" here. Because the prisoners in this case "are nonenemy aliens" – they are citizens of allied nations – the writ would have been available to them even at the Founding.[21] *St. Cyr*, 533 U.S. at 301; *see also id.* ("[A]t the absolute minimum, the Suspension Clause protects the writ as it existed in 1789." (quotation marks omitted)). In addition, the detentions here are the very sort that the Government conceded in *St. Cyr* must, under the Suspension Clause, be subject to testing by habeas corpus because they are supported by no statutory authorization. There is no evidence that Congress meant to suspend the writ during the current hostilities, let alone the plain and unambiguous statement required by the Court. *See supra* 14 and note 11.[22]

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[21] The historic right of aliens to test their status as alleged "enemies" in habeas proceedings, even when detained beyond the "ultimate sovereignty" of the United States, is canvassed by the Brief of Legal Historians *Amici Curiae*.

[22] The Use of Force Resolution that authorized the present military action hardly qualifies as explicit "statutory authorization" for a suspension of the writ. Congress' Authorization for Use of Military Force Joint Resolution, Pub. L. No. 107-40, 115 Stat. 224 (2001). During the Second World War, the Court held that the Articles of War did not strip the federal courts of habeas jurisdiction even though they explicitly purported to do so. *Yamashita*, 327 U.S. at 9 ("[Congress] has not withdrawn, and the Executive branch of the Government could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus."); *Quirin*, 317 U.S. at 24-25 (despite Articles of War, federal courts retained habeas jurisdiction). *Johnson* is not to the contrary, since the prisoners in *Johnson* had the opportunity to litigate their claims in the military commission. *See Swain v. Pressley*, 430 U.S. at 381-83 (no suspension of the writ if petitioner had an adequate chance to mount a collateral attack in coordinate court system); *St. Cyr*, 533 U.S. at 305 (suspension clause problem arises if writ is suspended with "no adequate substitute for its exercise."). *See* Part II *infra*.

These grave constitutional questions would confront the Court if the habeas statute were read as the Executive suggests – to close the courthouse doors to an entire class of habeas petitioners "without any clear indication that such was Congress' intent." *United States v. Castro*, 124 S. Ct. at 791. It should not be read that way.

C. Unreviewable Executive Detention Is Rejected Not Only By Anglo-American Tradition, But Also By "Every Modern Government"

Few canons of international law are now more universally accepted that the prohibition against prolonged, arbitrary detention. For centuries, the law in Anglo-American countries has not only prohibited indefinite detention without legal process, but allowed petitioners to challenge that detention by habeas.[23] The Executive's position that the

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[23] *See* Brief for the Commonwealth Lawyers Association as *Amicus Curiae* and Brief of Legal Historians as *Amici Curiae*.

prisoners at Guantánamo occupy a law-free zone recently prompted the English Court of Appeal to note its "deep concern that, in apparent contravention of fundamental principles of law, [the prisoners] may be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of [their] detention before any court or tribunal." *R. v. Sec'y of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ 1598, at ¶66 at ¶ 66. A senior judge in the United Kingdom recently described the detentions on Guantánamo as "a monstrous failure of justice."[24] This common tradition is further reflected in the holding of the Supreme Court of Canada. In *R. v. Cook*, [1998] 2 S.C.R. 587, ¶¶ 25, 44, 46, 48, that Court held that the Canadian constitution protects foreign nationals outside Canadian territory, so long as the conduct in question is that of Canadian Government officials, and application of the constitution will not interfere with the sovereign authority of a foreign state.[25]

Judicial review of executive detentions is not limited to common law jurisdictions. This principle is enshrined in the Constitutions of nearly every country in the civilized world,[26] as well as every major human rights instrument in force today, including the Universal Declaration of Human

[24] Lord Johan Steyn, Address to the British Institute of International and Comparative Law for the Twenty-Seventh F.A. Mann Lecture, *at* www.nimj.org (Nov. 25, 2003).

[25] *See* the discussion of *R. v. Cook* in the Brief of Omar Ahmed Khadr as *Amicus Curiae.*

[26] *See* M. Cherif Bassiouni, *Human Rights in The Context of Criminal Justice: Identifying International Procedural Protections And Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 261 n. 177 (1993) (listing 119 national constitutions that protect the right to be free from arbitrary arrest and detention.).

Rights,[27] the International Covenant on Civil and Political Rights,[28] and the American Declaration of the Rights and Duties of Man.[29] In 1950, when the Court decided *Johnson* – upon which the Executive places dispositive reliance – the Court took pains to note that "[t]he practice of every modern Government" is to refuse the protection of the "organic law" to enemy aliens convicted by a military trial. 339 U.S. at

[27] Universal Declaration of Human Rights, art. 9, G.A. Res. 217A (III), U.N. Doc. A/810 at 71, 73 (1948). Though the Universal Declaration is not a treaty, the United States recognizes that Article 9 embodies a rule of customary international law. Richard B. Lillich & Hurst Hannum, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 136 (3d ed. 1995).

[28] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16, at 15, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 [ICCPR]. The relevant provisions of the ICCPR, which the United States ratified in 1992, are unambiguous:

> Article 9(1): Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in according with such procedure as are established by law.
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> * * * *
>
> Article 9(4): Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in other that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

ICCPR, art. 9(1), 9(4); *Senate Resolution of Ratification of .International Covenant on Civil and Political Rights*, 138 Cong. Rec. S4781, *S4784, 102nd Cong. (1992) (ratified Apr. 2, 1992). Of the one hundred fifty-one states, including the United States, that have ratified the ICCPR, none has made a relevant reservation to these provisions. *See* United Nations Treaty Collection, *at* http://www.unhchr.ch/html/menu3/b/treaty4_asp.htm.) (last visited, January 5, 2004).

[29] American Declaration of the Rights and Duties of Man, art. XXV, O.A.S.T.S. 11, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

784-85. In the present circumstances, the reverse is true: "the practice of every modern Government" condemns prolonged Executive detention without legal process.

War works no exception to this settled principle of international law. The International Court of Justice has observed that "the protection of the [ICCPR] does not cease in times of war."[30] *See Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 240 (Advisory Opinion of July 8) *reprinted in* 35 I.L.M. 809, 820. The United Nations Human Rights Committee, which monitors compliance with the ICCPR, has held that Articles 9(1) (prohibiting arbitrary detentions) and 9(4) (guaranteeing judicial review of detentions) apply to all deprivations of liberty, and that Article 9(4) is non-derogable, even in times of armed conflict.[31] In any event, the United States has not declared any derogation from the Covenant. *See also Ocalan v. Turkey*, Eur. Ct. Hum. Rts., [2003] ECHR 46221/99, 12 MARCH 2003, PARS. 45, 66-76 (2003) (prompt judicial review required of detention of alleged terrorist accused of responsibility for more than 4,000 deaths).[32]

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[30] Unlike this Court, the International Court of Justice is expressly charged to render advisory opinions at the request of an authorized body. *See* Statute of the International Court of Justice, arts. 65-68, *available at* http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm (last visited January 5, 2004).

[31] *See* Human Rights Committee, Gen. Cmt. 8, art. 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 8 (1994) at para. 1; Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) at. para. 16.

[32] *See also Aksoy v. Turkey*, 23 E.H.R.R 553 (1996) (though Turkey had lawfully declared a national emergency, it could not hold a suspected terrorist for fourteen days without judicial intervention); *Chahal v. United* Kingdom, 23 E.H.R.R 413, ¶ 131 (1997) (concern for national security, though legitimate, "does not mean ... that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved").

International humanitarian law – part of the law of war – similarly provides that even during hostilities, prisoners may not be held without legal process. Over 190 countries, including the United States, are parties to the Geneva Conventions.[33] Under the Conventions, the rights due to an individual vary with the person's legal status. The Official Commentary to the Fourth Geneva Convention,[34] makes clear that "every person in enemy hands must have some status under international law ... [N]obody in enemy hands can be outside the law." COMMENTARY ON GENEVA CONVENTION IV OF AUG. 12, 1949, at 51 (Jean S. Pictet ed., 1958). To implement this command, Article 5 of the Third Geneva Convention, governing prisoners of war, requires that any doubt regarding the status of a person captured by the detaining power must be resolved by a "competent tribunal," and that all detainees enjoy prisoner of war status unless and until an Article 5 tribunal determines otherwise.[35]

In light of these settled principles, it is not surprising that the detentions at Guantánamo have come under sharp criticism from the international community, including the International Committee of the Red Cross, the United

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[33] *See* International Committee of the Red Cross (ICRC), *States Party to the Geneva Conventions and their Additional Protocols, at* http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/party_gc#a7 (May 20, 2003). The requirements of the Geneva Conventions are discussed in detail by several *amici*. *See* Brief of Former American Prisoners of War as *Amicus Curiae*; Brief of Retired Military Officials as *Amicus Curiae*.

[34] Geneva Convention IV Relative to the Protection of Civilians in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[35] Geneva Convention III Relative to the Treatment of Prisoners of War, art. 5, Aug. 12, 1949, 6 U.S.T. 3316, U.N.T.S. 135 This provision was not part of the 1929 Convention, which the Court considered in *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

Nations, and the European Parliament. In 2002, the Inter-American Commission on Human Rights of the Organization of American States, of which the United States is a member, decided that the Guantánamo prisoners may not be held "entirely at the unfettered discretion of the United States Government" and that the Government must convene competent tribunals to determine the legal status of the prisoners under its control. Decision on Request for Precautionary Measures (Detainees at Guantánamo Bay, Cuba), Inter-Am.C.H.R. (Mar. 12, 2002), *reprinted in* 41 I.L.M. 532, 533 (2002).[36]

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[36] The United States has also rejected the view of the United Nations High Commissioner for Human Rights, the United Nations Working Group on Arbitrary Detention, the United Nations Special Rapporteur on the independence of judges and lawyers, the European Parliament, the Parliamentary Assembly of the Council of Europe, the Parliamentary Assembly of the Organization for Security and Co-operation in Europe, and the International Committee of the Red Cross (ICRC), all of which disagree with the Government's position on Guantánamo. *See* Statement of High Commissioner for Human Rights on Detention of Taliban and Al Qaida Prisoners at U.S. Base in Guantánamo Bay, Cuba, 16 Jan. 2002. P.A.75a-76a; Report on the Working Group on Arbitrary Detention, U.N. GAOR, Hum. Rts. Comm., 59th Sess., U.N. Doc. E/CN.4/2003/8 at 19-21, Dec. 16, 2002. P.A.77a-82a, J.A.__; Statement of Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, *at* http://www.unhchr.ch/huricane/huricane.nsf/0/0C5F3E732DBFC069C1256CE8002D76C0?opendocument (Mar. 12, 2003; European Parliament Resolution on the European Union's Rights, Priorities and Recommendations for the 59th Session of the U.N. Commission on Human Rights in Geneva (Mar. 17 – Apr. 25, 2003), *available at* http://europa.eu.int/abc/doc/off/bull/en/200301/p102001.htm; Rights of Persons Held in the Custody of the United States in Afghanistan and Guantánamo Bay, Parliamentary Assembly Resolution No. 1340 (2003) (Adopted June 26, 2003), *available at* http://assembly.coe.int/Documents/Adopted Texts; Organization for Security and Co-operation in Europe Parliamentary Assembly Rotterdam Declaration and Resolutions Adopted during the 12th Annual Session (Rotterdam, July 5-9, 2003), *available at* http://www.osce.org/documents/pa/2003/07/495_en.pdf; International Committee of the Red Cross, Overview of the ICRC's Work for Internees, *at* http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList454/951C74F20D2A2148C1256D8D002CA8DC (November 6, 2003).

The Executive's proposed reading of the habeas statute would thus put the United States in flagrant disregard of globally recognized norms. Just as the Court should avoid an interpretation of the statute that runs afoul of the Constitution, it should avoid an interpretation in conflict with international law. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) at 18; *Restatement (Third) of Foreign Relations Law of the United States* § 114 (2000) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.").[37]

II. THE GOVERNMENT OFFERS NO PERSUASIVE REASON TO IGNORE THE UNAMBIGUOUS COMMAND OF THE HABEAS STATUTE

The Executive argues that the current hostilities demand indefinite detention without legal process. Indeed, the argument is broader still; the contention is made that Executive action has become "proof of its own necessity," and that no court may inquire into the lawfulness of the

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[37] As the Court has recently observed, these international norms may also provide persuasive authority for the interpretation of constitutional values. *E.g., Lawrence v. Texas*, 123 S. Ct. 2472, 2481, 2483 (2003); *Atkins v. Virginia*, 536 U.S. 304, 316 n. 21 (2002); *see also* Brief *Amicus Curiae* of the Human Rights Institute of the International Bar Association (discussing obligations imposed by international law).

detentions on Guantánamo. *Duncan v. Kahanamoku*, 327 U.S. 304, 336 (1946) (Stone, J., concurring); *see also Sterling v. Constantin*, 287 U.S. 378, 401 (1932) ("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.").

The Executive makes this argument despite the text of the habeas statute, the absence of any Congressional indication that federal courts should be stripped of their habeas jurisdiction, the settled practice of this Court to take jurisdiction of habeas petitions filed by people imprisoned beyond the "ultimate sovereignty" of the United States, and the considerable weight of constitutional doubt. To support its argument, the Executive relies heavily on *Johnson v. Eisentrager*, 339 U.S. 763 (1950). But as demonstrated below, this reliance is misplaced.

A. Introduction

In *Johnson*, the Court was asked to grant post-conviction habeas review to enemy aliens who were convicted of war crimes by a military commission. The commission had been created pursuant to explicit Congressional authorization during a declared war. The prisoners were convicted, sentenced, and imprisoned in occupied enemy territory temporarily controlled by the U.S. military as an incident of our wartime operations. At trial, the prisoners had the right to challenge the lawfulness of their detention. They also enjoyed due process protections that insured against the conviction of an innocent person. In fact, six of the original twenty-seven defendants were acquitted and released.

The Court held that these convicted war criminals did not enjoy the "privilege of litigation" in the federal courts. *Id.* at 777. It couched some portions of its opinion in jurisdictional terms.[38] *See, e.g., id.* at 791 (prisoners present "no basis for invoking federal judicial power in any district."). Seizing on this language, the Executive assigns the broadest possible reading to the case: federal courts are always powerless to review executive detention of aliens outside the "ultimate sovereignty" of the United States, regardless of the circumstances. *See* Government's Brief In Opposition to Certiorari at 16, 18-19. But *Johnson* is more ambiguous than that. It is useful to examine what the Court *did*, not merely what it occasionally said.

Johnson is best understood not as a limitation on the *power* of the federal judiciary, but as a restraint on the *exercise* of habeas based on the factors present in that case. The Court limited the exercise of habeas to a determination that the prisoners were enemy aliens imprisoned in occupied territory who had received a lawful trial before a properly constituted military commission. Because these threshold questions were not in dispute, the Court refused to countenance any further interference with the operation of a lawful and independent system of military justice.

The present case stands on entirely different footing. Congress has not authorized trials by military commission, and, even if it had, the prisoners here have been detained for two years with no legal process. They are not enemy aliens, but citizens of our closest allies who allege they have

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[38] *See also, e.g., Chin Yow v. United States*, 208 U.S. 8, 11-13 (1908) (if alien had a fair exclusion hearing, district court would not have jurisdiction to consider habeas application; but if petitioner did not have a fair hearing, district court had jurisdiction and could grant habeas relief); *see also infra* 40-41 and n. 40.

committed no wrong against the United States, and whose allegations at this stage must be accepted as true. Because there have been no proceedings, they do not seek post-conviction relief from an overseas trial by a lawfully constituted tribunal. Instead, they challenge the fact that they have been cast into a legal limbo, held by the Executive without charges, without recourse to any legal process, and with no opportunity to establish their innocence.

B. The Court In *Johnson* Restrained The Exercise Of Habeas Where A Lawful And Independent System of Justice Had Allowed The Prisoners To Challenge Their Detention

By December 11, 1941, Congress had declared war on Germany and Japan. Within weeks, Congress passed the Articles of War. 10 U.S.C. §§ 1471-1593. These Articles authorized the President to convene military commissions to try suspected war criminals. *Quirin*, 317 U.S. at 28 ("Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases.").

Throughout the Second World War, the Executive repeatedly invoked the power given it by Congress, creating military commissions to try suspected war criminals captured here and abroad. *See, e.g., id.* ("[T]he President, as Commander in Chief, by his Proclamation in time of war has invoked [the Articles of War]"); *Yamashita*, 327 U.S at 7-12 (Articles of War authorized creation of military commission in the Philippines); *Johnson*, 339 U.S. at 766, 786 (military commission had authority to preside over trials in Nanking, China). On January 21, 1946, the Executive invoked this

power and convened a military commission to try alleged war criminals in the China Theater. *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (Case No. 306), Index to Pleadings filed in Supreme Court, Ex. F -"Regulations Governing the Trial of War Criminals in the China Theater," at 34 [hereinfter *Johnson*, Index to Pleadings]. J.A.155-56.

Each commission consisted of at least three service members who had to be free from "personal interest or prejudice" and who could not preside over "a case which he personally investigated, nor if he [was] required as a witness in that case." J.A.158 Whenever feasible, every commission was to include "one or more members" with legal training. J.A.159. No sentence could be executed until approved by a commanding officer, who also had the power to reduce the sentence or order a new trial. J.A.165

The prisoners in *Johnson* were tried by these commissions. After Japan surrendered, the military arrested twenty-seven German nationals in China. A Bill of Particulars accused them of violating the laws of war. *Johnson*, Index to Pleadings, Ex. C - "Charge and Bill of Particulars Against Lothar Eisentrager, *et al.*, at 25-34. J.A. 142-55. Prior to trial, the commission conducted a two-day hearing, where the prisoners unsuccessfully urged the same Constitutional issues they would later raise before the Supreme Court. *Johnson*, Index to Pleadings, Petition for Writ of Habeas Corpus, at 4-5. J.A.127-40. After four weeks of trial, the commission granted motions for judgment of acquittal with respect to six prisoners. J.A.134. The defense case for the remaining prisoners lasted an additional eight weeks. J.A.135.

The commission found each prisoner guilty of war crimes "by engaging in, permitting or ordering continued

military activity against the United States after surrender of Germany and before surrender of Japan." *Johnson*, 339 U.S. at 766. After the commission sentenced the prisoners to various terms, the reviewing authority reduced the sentences for three prisoners and approved the remainder. J.A. 136. Throughout these proceedings, the prisoners enjoyed the right to notice of the charges against them, to prompt appointment of counsel of choice, to prepare a defense, to call and confront witnesses, to compulsory process, to discover and introduce evidence, and to make an opening statement and closing argument. J.A. 160-65 After they were repatriated to Germany, the prisoners sought post-conviction relief in the District of Columbia, claiming unspecified violations of the Fifth Amendment and other provisions of the Constitution and the 1929 Geneva Convention. 339 U.S. at 767. In addition, the prisoners admitted they were enemy aliens. *Id.* at 784.

Thus, the prisoners in *Johnson* were tried by a lawfully constituted and independent military court that provided them an opportunity to challenge the lawfulness of their detention. The Court has long held that lawfully created military courts, sanctioned by Congress in the valid exercise of their Article I power, represent an independent judicial system whose lawful judgments are not subject to plenary review by the civilian courts. *See, e.g., In re Grimley*, 137 U.S. 147, 150 (1890) ("[The] civil courts exercise no supervisory or correcting power over the proceedings of a court-martial."); *Hiatt v. Brown*, 339 U.S. 103, 111 (1950) (same) (collecting cases). The Court reaffirmed this principle throughout the Second World War, and repeatedly applied it to military commissions. As the Court explained in *Yamashita*:

> [O]n application for habeas corpus we are not concerned with the guilt or innocence of the

> petitioners. We consider here only the lawful power of the commission to try the petitioner for the offense charged. . . . The military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court .... Congress conferred on the courts no power to review their determinations save only as it has granted judicial power "to grant writs of habeas corpus for the purpose of an inquiry into the cause of the restraint of liberty." 28 U.S.C. §§ 451, 452. The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner. If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts.

Yamashita, 327 U.S. at 8; *see also Quirin*, 317 U.S. at 24.

The Court has often restrained the exercise of habeas to avoid interference with lawful and independent military judicial systems. For example, three years after *Johnson*, the Court considered a habeas application from American servicemen court-martialed in Guam. *Burns*, 346 U.S at 138. The Court readily concluded that the habeas statute provided jurisdiction. *Id.* at 139. The question was "not whether the District Court has any power at all to consider petitioners' applications; rather our concern is with the manner in which the Court should proceed to exercise its power." *Id.*

In answering this question, the plurality noted that "[t]he military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights." *Id.* at 142. Consistent with this responsibility, the military had provided

the petitioners in *Burns* with repeated opportunities to litigate their claims. *Id.* at 140-42. The Court concluded "it would be in disregard of the statutory scheme if the federal civil courts failed to take account of the prior proceedings – of the fair determinations of the military tribunals after all military remedies have been exhausted." *Id.* at 142. This military process

> does not displace the civil courts' jurisdiction over an application for habeas corpus from the military prisoner. But . . . *when a military decision has dealt fully and fairly with an allegation . . . it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence.*

Id. (emphasis added) (citation omitted); *see also Gusik v. Schilder*, 340 U.S. 128, 131-132 (1950) (habeas petitioner must first exhaust available remedies in military system: "The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved.").

As *Burns* intimates, the Court has sometimes limited the substantive claims for relief that the federal courts should entertain in habeas, in order to recognize an appropriate division of responsibility between those courts and another competent adjudicatory system. But these limitations have been imposed *only* when the habeas petitioners were challenging their confinement under orders issued by a lawfully created and convened coordinate system of tribunals in which they enjoyed a full and fair opportunity to present their claims; and the Court has always made clear that the limitations are upon the *extent of habeas review*, not upon the *existence of habeas jurisdiction. See, e.g., Ex parte Royall*,

117 U.S. 241, 252 (1886) (to avoid interference with the "courts of co-ordinate jurisdiction, administered under a single system," and in the absence of any indication that the state court had abused its authority, Court declines to exercise its undisputed power under the habeas statute); *Stone v. Powell*, 428 U.S. 465, 481-82 (1976) (federal court has jurisdiction under habeas statute, but will restrain exercise of judicial power for Fourth Amendment claims fully and fairly adjudicated in state court); *Frank v. Mangum*, 237 U.S. 309, 329, 334-36 (1915).[39] Indeed, if the petitioner has been denied that opportunity, it is well settled that "a federal court should entertain his petition for habeas corpus, else he would be remediless." *Ex parte Hawk*, 321 U.S. 114, 118 (1944) (per curiam) (citations omitted).[40]

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[39] *See also Withrow v. Williams*, 507 U.S. 680, 716 (1993) (Scalia, J., dissenting on other grounds) ("[T]he most powerful equitable consideration [in deciding whether to restrain the exercise of habeas is whether petitioner] has already had full and fair opportunity to litigate [his] claim.").

[40] The Court has long recognized that federal habeas is available to fill the void created by an inadequate remedy in the coordinate system of justice. *See, e.g., Chin Yow*, 208 U.S. at 11-13; *Kwack Jan Fat v. White*, 253 U.S. 454, 457-58 (1920) (immigration findings by Executive are conclusive unless petitioner establishes in habeas that "the proceedings were manifestly unfair, were such as to prevent a fair investigation, or show manifest abuse of the discretion committed to the executive officers by the statute, or that their authority was not fairly exercised, that is, consistently with the fundamental principles of justice embraced within the conception of due process of law.") (internal citations and quotations omitted); *Moore v. Dempsey*, 261 U.S. 86, 91 (1923)(if state fails to provide an adequate "corrective process" to a trial dominated by mob sentiment, petitioner may seek review and secure relief by federal habeas); *Johnson v. Zerbst*, 304 U.S. at 467 (habeas must be available to provide remedy for constitutional violations that, through no fault of the petitioner, cannot be remedied elsewhere); *Burns*, 346 U.S. at 142 (plurality) ("Had the military courts manifestly refused to consider [petitioners' claims], the District Court was empowered to review them *de novo*.").

As on these other occasions, the Court in *Johnson* restrained the exercise of habeas to avoid interfering with the military commissions. Thus, the Court refused to provide the prisoners with the right to appear before the District Court, "[a] basic consideration in habeas corpus practice" as it existed at that time.[41] 339 U.S. at 778. The Court, however, did not consider itself powerless to inquire into the lawfulness of the prisoners' detention. On the contrary, the Court stated that "the doors of our courts have not been summarily closed upon these prisoners," *id.* at 780.

First, the Court reviewed at great length the legal disabilities imposed upon enemy aliens, and took pains to emphasize that these disabilities are "imposed temporarily as an incident of war and not as an incident of alienage." *Id.* at 772. Beginning with this historical understanding, the Court then undertook "the same preliminary hearing as to sufficiency of application" that was extended in *Quirin*, *Yamashita*, and *Hirota v. McArthur*, 338 U.S. 197 (1949). This review established, without the need for further inquiry, that the prisoners "are really enemy aliens," *id.* at 784, who hav been "active in the hostile service of an enemy power," *id.* at 778, and who were convicted by a lawful military commission, *id.* at 777. Having heard "all contentions [the prisoners] have seen fit to advance and considering every contention we can base on ther application and the holding below," the Court arrived "at the same conclusion" as in *Quirin*, *Yamashita*, and *Hirota*: "that no right to the writ of habeas corpus appears." *Id.* at 781.

Second, the Court reviewed the prisoners' challenge to the "jurisdiction" of the military commissions, and ultimately

[41] The habeas statute has been amended since *Johnson* and this is no longer an essential feature of habeas practice. *30th Judicial Circuit Court*, 410 U.S. at 497-98.

concluded that it failed. *Id.* at 785-788; *see also id.* at 790 ("We are unable to find that the petition alleges any fact showing lack of jurisdiction in the military authorities . . . ."). Two months before *Johnson*, the Court used this 'jurisdictional' formulation to describe its *merits* review of a habeas petition challenging military detention. *Hiatt v. Brown*, 339 U.S. at 110 ("[I]t is well settled that by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial .... The single inquiry, the test, is jurisdiction" (internal quotations omitted)). The Court also used this articulation to describe its *merits* review of the habeas petitions brought in *Quirin* and *Yamashita*. *Quirin*, 317 U.S. at 27-29; *Yamashita*, 327 U.S. at 8-9. Yet in all of these cases, federal habeas jurisdiction was not in dispute. *See also Burns*, 346 U.S. at 142 ("We have held before that this [military process] does not displace the civil courts' jurisdiction over an application for habeas corpus from the military prisoner.").

And third, the Court in *Johnson* adjudicated the merits of the prisoners' claims under both the Constitution and the 1929 Geneva Convention. The Court rejected the prisoners' contention that the Fifth Amendment conferred "a right of personal security or an immunity from military trial and punishment upon an enemy alien engaged in the hostile service of a government at war with the United States," *Johnson*, 339 U.S. at 785, as well as their other arguments under the Constitution and the Convention. *Id.* at 788-790.

This extensive and multi-faceted review of the prisoners' claims cannot be squared with the Government's contention that the Court did not have jurisdiction. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of

announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869).

To be sure, *Johnson* occasionally uses the term "jurisdiction" in its modern sense – *i.e.*, "the courts' statutory or constitutional *power* to adjudicate the case," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) – and the decision is ambiguous for this reason.[42] But the better reading – the reading that is faithful to the language of the habeas statute, that considers what the Court *did*, and that avoids needless conflict with a lawfully created coordinate system of military justice – is to view *Johnson* as a restraint on the exercise of habeas, not as a limitation on the courts' power to act.

The formal denial of post-conviction review in *Johnson* is, in any event, no bar to habeas jurisdiction where, as here, the petitioners have been held completely without legal process for two years. They have had no opportunity to challenge the lawfulness of their detention and there has been no proceeding in a lawfully created coordinate system of justice to which this Court can defer. They are not enemy aliens, but citizens of our closest allies. Just as the habeas statute gave the Court the power to act in *Johnson*, the statute provides the power to act in this case; but the very factors that called for restraint in *Johnson* are notable here for their absence, and now call for the opposite result.[43]

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[42] *Johnson* thus confirms that jurisdiction "is a word of many, too many, meanings." *Citizens for a Better Env't*, 523 U.S. at 90 (internal quotations omitted). Elsewhere, *Johnson* uses the term "jurisdiction" to refer to "the territorial jurisdiction" of the United States. *E.g.*, *id.* at 768 ("We are cited to no instance where a court . . . has issued [the writ] on behalf of an alien enemy who, at no relevant time and at no stage of his captivity, has been within its territorial jurisdiction.").

[43] Even if *Johnson* were a jurisdictional holding – that federal courts do not have habeas jurisdiction over enemy aliens lawfully tried, convicted,

C. Guantánamo Is Not Like Wartime China or Germany

Here, unlike in *Johnson*, the petitioners are held at Guantánamo. The Executive concedes that if the petitioners were being held in the United States, the federal courts would be open to them. *Gherebi v. Bush*, __F.3d__, 2003 WL 22971053, at *4 (9th Cir. Dec. 18, 2003). It offers no persuasive reason why an area subject to the complete, exclusive, and indefinite jurisdiction and control of the United States, where this country alone has wielded power for more than a century, should be treated the same as occupied enemy

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and imprisoned in areas equivalent to post-war China and Germany – federal courts have at least the power to inquire whether these factors are present. Indeed, the Court in *Johnson* undertook precisely this inquiry. The Court has long recognized the power of a habeas court to inquire into the "jurisdictional facts" that mark the outer bounds of its power. *See, e.g.*, *Ludecke*, 335 U.S. at 163 n. 5 (whether petitioner is alien enemy is a jurisdictional fact that may be tested in habeas); *Johnson*, 333 U.S. at 775 (same); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (claim of citizenship is a jurisdictional fact that may be tested in habeas prior to alleged alien's deportation: "The situation bears some resemblance to that which arises where one against whom proceedings are being taken under the military law denies that he is in the military service. It is well settled that in such a case a writ of habeas corpus will issue to determine the status."); *see also* Brief *Amici Curiae* of Legal Historians (at common law, habeas courts had jurisdiction to resolve whether the prisoner was in fact an enemy alien).

As demonstrated below, Guantánamo is in no relevant respect akin to post-war China and Germany. But even if it were, the prisoners in this case, unlike the prisoners in *Johnson*, are not enemy aliens, have not been provided the benefit of the Geneva Conventions, and have not been tried by a military commission. The factors that led to the result in *Johnson* have never been established in this case, and the Petitioners' allegations are all to the contrary.

territory, temporarily controlled as an incident of wartime operations.

The Executive also concedes that if the prisoners at Guantánamo were U.S. citizens, federal habeas would lie.[44] It offers no persuasive reason why the courthouse doors should be open to citizens detained at Guantánamo but not to citizens of our closest allies who allege they have committed no wrong against this country.

Once again, the Executive relies heavily on stray language in *Johnson*. And again the reliance is misplaced. The Court in *Johnson* repeatedly noted the prisoners' lack of connection to this country's "territory," or "territorial jurisdiction." *See, e.g., Johnson*, 339 U.S. at 768 ("We are cited to no instance where a court...has issued [the writ] on behalf of an alien enemy who, at no relevant time and at no stage of his captivity, has been within its territorial jurisdiction."); *id.* at 771 ("[I]n extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act."); *id.* at 781 (criticizing lower court for dispensing with "all requirement of territorial jurisdiction."); *id.* at 777 (writ should not extend to enemy alien detained "outside of our territory and there held in military custody as a prisoner of war.") The Court also observed that the prisoners had not come within United States sovereignty. *Id.* at 778. At no time did the Court indicate that this observation was essential to the result.[45] Still, the Executive seizes on this language and

[44] *See supra* 16 & n.16 (citing oral arguments in *Padilla*).

[45] The *Johnson* dissenters certainly did not believe the holding depended on whether the petitioners had set foot within the "ultimate sovereignty" of the United States. The dissent never uses the word 'sovereignty' and criticizes the majority for making the result turn on whether the prisoners had come within the "territorial jurisdiction." 339 U.S. at 796 (Black, J., dissenting) ("a majority may hereafter find citizenship a sufficient substitute for territorial jurisdiction.").

argues that this Nation's relationship to Guantánamo brings the case within *Johnson* because the lease governing the base grants Cuba "ultimate sovereignty" over the territory.

To suggest that because of these undefined terms, Guantánamo is no more amenable to federal habeas jurisdiction than occupied enemy territory defies reality.[46] The Government has long considered Guantánamo to be "practically . . .a part of the Government of the United States." 25 Op. Att'y Gen. 157 (1904). Solicitor General Olson once described the base as part of our "territorial jurisdiction" and "under exclusive United States jurisdiction." 6 Op. Off. Legal Counsel. 236, 242 (1982) (opinion of Asst. Attorney General Olson). The same treaty article that reserves an undefined quantum of "ultimate sovereignty" for Cuba grants the United States "complete jurisdiction and control" over the base. Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 16-23, 1903, art. III, T.S. No. 418, 6 Bevans 1113. The Executive determines who may enter and leave the base, and enjoys the power "to acquire .... any land or other property therein by purchase or by exercise of eminent domain." *Id.*; *see United States v. Carmack*, 329 U.S. 230, 236 (1946) ("The power of eminent domain is essential to a sovereign government."). United States law governs the conduct of all who are present on the base, citizen and alien alike; and violations of criminal statutes are prosecuted in the Government's name. *See, e.g., United States v. Lee*, 906 F. 2d 117 (4th Cir. 1990).

[46] A number of *amici* discuss the nature and history of Guantánamo in detail. *See* Brief of Former Guantánamo Officials as *Amicus Curiae*; Brief of National Institute of Military Justice as *Amicus Curiae*.

Consistent with the Treaty language, the United States has long exercised prescriptive and adjudicative jurisdiction over Guantánamo. In *Vermilya-Brown v. Connell*, 335 U.S. 377 (1948), the Court made clear that Guantánamo is presumptively covered by federal statutes regulating conduct in "territories and possessions" and that the rule against "extraterritorial application" of federal law has no provenance in a case arising from Guantánamo. *Id.* at 390 ("[W]here [the statute's] purpose is to regulate labor relations in an area vital to our national life, it seems reasonable to interpret its provisions to have force where the nation has sole power.").

Unlike the conditions that prevailed in *Johnson*, Congress governs Guantánamo pursuant to its Article I and IV powers. Courts routinely take jurisdiction of cases that arise from the base, and have long exercised their power to test Government action on the base against the requirements of the Constitution. *See, e.g., Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1583 (Fed. Cir. 1993) (finding violation of Takings Clause by Navy); *Burtt v. Schick*, 23 M.J. 140, 142-43 (U.S.C.M.A. 1986) (granting writ of habeas corpus and holding that impending court martial proceeding on Guantánamo would constitute double jeopardy, in violation of 10 U.S.C. § 844(a)). *Cf. Johnson*, 339 U.S. at 780 ("[T]he scenes of [petitioners'] offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States."). And while Guantánamo is a military installation, it is eight thousand miles from the theater of operations, and manifestly not under martial law. *Compare Padilla*, 2003 U.S. App. LEXIS 25616 at *57-*58 (2d Cir. Dec. 18 2003) (Chicago not in theater of operations), *with Johnson*, 339 U.S. at 780 (events in *Johnson* took place within "a zone of active military operations or under martial law").

Equally important, Cuba's laws are wholly ineffectual in Guantánamo. United States governance, now entering its second century, is potentially permanent and in no way dependent on the wishes or consent of the Cuban Government. Treaty Defining Relations with Cuba, May 29, 1934 U.S. – Cuba, art. III, 48 Stat. 1682, 1683, T.S. No. 866. Indeed, the Cuban Government has long characterized the United States presence as "illegal" and refuses to cash the annual rent payment of $4,085 the United States has tendered pursuant to the lease. *See Bird v. United States*, 923 F. Supp. 338, 341 n.6 (D. Conn. 1996). Recently, the Cuban Government added its voice to the chorus of governments criticizing the detentions on Guantánamo. Anita Snow, *Cuba Rants About Use of U.S. Navy Base*, FT. WORTH STAR-TELEGRAM, Dec. 27, 2003, at 14. However, "ultimate sovereignty" does not imply actual authority, as the United States has ignored Cuba's complaints and "continues to recognize the validity of these treaties." *Bird*, 923 F. Supp. at 341 (citing U.S. Dep't of State, *Treaties in Force* (1995); U.S. Dep't of State, "Fact Sheet: Cuba," Feb. 22, 1993, *available in* Westlaw, 1993 WL 2977391.

The extent of our jurisdiction and control in Guantánamo, and its amenability to judicial process, stands in stark contrast to the situation in *Johnson*. The Executive could not convene a military commission to try the *Johnson* petitioners unless it first secured permission from the Chinese Government. *Johnson*, Index to Pleadings, Ex. 4 - Message of 6 July 1946 to Wedemeyer from Joint Chiefs of Staff. J.A.167. The same is true of Landsberg prison, where the *Johnson* petitioners were detained. The United States shared jurisdiction and control over detentions in occupied Germany with the United Kingdom and France. *See* Basic Principles for Merger of the Three Western German Zones of Occupation and Creation of an Allied High Commission,

reprinted in DOCUMENTS ON GERMANY, 1944-70, Comm. on Foreign Relations, 92nd Cong., (Comm. Print 1970), at 150-51, and the occupation in Germany was avowedly temporary. *See* Protocol of the Proceedings of the Berlin (Potsdam) Conference, Aug. 1, 1945, *reprinted in* DOCUMENTS ON GERMANY, 1944-1961, Comm. on Foreign Relations, United States Senate, 87th Cog., 1st Sess. 8 (Comm. Print 1961); *see also Johnson*, 339 U.S. at 797 (Black, J., dissenting)(China and Germany were "temporarily occupied countries.").[47]

D. The Current Hostilities Do Not Justify A Departure From Settled Practice

Lastly, the Executive makes vague reference to the ongoing hostilities in Afghanistan, as though this were sufficient reason to permit the creation of a prison beyond the law, eight thousand miles away. But until this litigation began, the United States had never proposed that military necessity demanded indefinite detention without legal process

[47]The Government also relies on *United States v. Spelar*, 338 U.S. 217, 200 (1949), which held that plaintiffs injured on a United States base in Canada could not sue under the Federal Tort Claims Act ("FTCA") because the base was in a foreign country. That case involved the interpretation of a particular statute; Congress's authority to legislate was not in question, and the possibility that territory is "foreign" for some purposes and not for others is uncontroversial. *See Downes v. Bidwell*, 182 U.S. 244, 341 (1901) ("Porto Rico . . . was foreign to the United States in a domestic sense"); *see also Vermilya-Brown*, 335 U.S. at 386-390 (presumption against extraterritorial application does not govern in United States "possessions"). For that reason, courts have held that Government action in a territory is constrained by the Constitution, even though the territory may be in a foreign country, which precludes litigation under the FTCA. *Compare Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir.), *reh'g denied*, 569 F.2d 636 (D.C. Cir. 1977) (fundamental constitutional rights apply in Pacific Trust Territories), *with Callas v. United States*, 253 F.2d 838, 839-40 (2d Cir.), *cert. denied*, 357 U.S. 936 (1958) (FTCA does not extend to Pacific Trust Territory).

for prisoners captured during hostilities, nor does the military take that position during the present conflict in Iraq.

On the contrary, the military has adopted a comprehensive set of regulations to insure that no person be detained without legal process. *Enemy Prisoners of War, Detained Personnel, Civilian Internees, and Other Detainees*, U.S. Army Regulation 190-8 (applicable to the Departments of the Army, the Navy, the Air Force, and the Marine Corps (October 1, 1997)). P.A.71a-74a. These regulations trace their origin to the Vietnam conflict, when the United States often captured people whose status under the Convention was in doubt. "[R]arely did the Viet Cong wear a recognizable uniform, and only occasionally did the guerrillas carry their arms openly. Additionally, some combat captives were compelled to act for the Viet Cong out of fear of harm to themselves or their families." Frederic L. Borch, JUDGE ADVOCATES IN COMBAT 21 (Office of the Judge Advocate General 2001); Howard S. Levie, PRISONERS OF WAR 57 (Naval War College Press 1978). The nature of the conflict, in other words, created a distinct risk of capturing innocent civilians.

Rather than allow innocent detainees to languish in custody, the military created "Article 5 tribunals" to resolve all doubtful cases.[48] Levie, PRISONERS OF WAR at 57. These tribunals, which operated during hostilities within the theater of operations, consisted of at least three officers, including one who was "a judge advocate or other military lawyer

[48] So named because they implement Article 5 of the Third Geneva Convention. As noted above, Article 5 requires that "any doubt" regarding the status of a person captured by the detaining power be resolved by a "competent tribunal," and that all detainees enjoy POW status unless and until an Article 5 tribunal determines otherwise. Geneva III, art. 5, 6 U.S.T. at 3324, 75 U.N.T.S. at 142.

familiar with the Geneva Convention." Directive Number 20-5, United States Military Assistance Command, Vietnam (March 15, 1968), *reprinted in* 62 Am. J. Int'l L. 765 (1968). Detainees enjoyed the "fundamental rights considered to be essential to a fair hearing," including the right to counsel and an interpreter. *Id.* at 771. Counsel had "free access" to his client, was given at least one week to prepare, and, at the hearing had the right to call and cross-examine witnesses, to present evidence, and to make an opening and closing statement. The tribunal determined whether a detainee was a prisoner of war, a "civil defendant" subject to Vietnamese law, or an innocent civilian who should be released. *Id.* at 767; Borch, JUDGE ADVOCATES IN COMBAT, at 21. No one was held without a legal status. Directive Number 20-5, *reprinted in* 62 AM. J. INTL. LAW at 768.

Today, Article 5 tribunals consist of three commissioned officers. Prisoners may attend all open sessions and they enjoy the services of a qualified interpreter. They may testify on their own behalf, call witnesses, present documentary evidence, and question witnesses called by the tribunal. Prisoners may also remain silent and cannot be compelled to testify. At the close of the hearing, the tribunal determines, in a written report, whether the person is a prisoner of war, who enjoys the full protections of the Geneva Convention, a religious person who is likewise "entitled to" POW protections, an innocent civilian "who should immediately be returned to his home or released," or a civilian internee "who for reasons of operational security, or probable cause incident to criminal investigation, should be detained." U.S. Army Regulation 190-8, at 1-6e. The tribunal may reach no other possible outcome, and no one is held without some defined status. *Id.* at 1-6e(10). Persons in the civilian-internee category may not be punished "without further proceedings to determine what acts they may have

committed and what penalty should be imposed." *Id.* at 1-6g. Finally, any decision denying POW status "shall be reviewed for legal sufficiency" by the office of the Judge Advocate General. *Id.*

Since Vietnam, Article 5 tribunals have been a settled part of military practice. During the first Persian Gulf War, the United States conducted nearly 1,200 Article 5 tribunals, finding that 310 detainees were entitled to POW status, with the remainder entitled to refugee status. *See* Dep't of Defense, Conduct of the Persian Gulf War: Final Report to Congress Pursuant to Title V of the Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991 (Public Law 102-25) App. L. at 577 (Apr. 1992). Even during the present conflict in Iraq, within the field of battle, the military continues to conduct these tribunals. War Briefing, Army Col. John Della Jacono, Enemy Prisoner of War Briefing from Umm Qar, Iraq (May 8, 2003), *available at* 2003 WL 1864306. Why the same process should be denied to citizens of our closest allies who have done no harm to the United States and who remain imprisoned half a world away, is a mystery.

* * *

In sum, whatever may have been the justification for restricting the exercise of habeas in *Johnson* – a matter on which the prisoners here take no position – the prisoners in *Johnson* were enemy aliens who were given the opportunity to litigate their claims in a coordinate system of justice created by the valid exercise of Congressional authority during a declared war. They were charged, tried, convicted, and held in occupied territory temporarily controlled by the military. The considerations that counseled in favor of restraint in that case now call for the opposite result – judicial exercise of jurisdiction to review indefinite detentions.

CONCLUSION

The Court should reverse the judgment below and remand to the D.C. Circuit to allow the prisoners to challenge the lawfulness of their detention in the district court.

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